

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1243

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

—against—

HOWARD R. HUGHES, HUGHES TOOL
COMPANY and RAYMOND M. HOLLIDAY,

Defendants-Appellants.

**BRIEF FOR DEFENDANTS-APPELLANTS HUGHES
TOOL COMPANY AND RAYMOND M. HOLLIDAY**

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May 28, 1974



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FOR THE SECOND CIRCUIT

Docket No. 74-1243

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Plaintiff-Appellee,

—against—

HOWARD R. HUGHES, HUGHES TOOL
COMPANY and RAYMOND M. HOLLIDAY,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY

This brief presents the arguments of defendants-appellants Hughes Tool Company ("Toolco")* and Raymond M. Holliday in support of their appeal from so much of an order of the District Court for the Southern District of New York (the "District Court") as (a) disallowed as taxable costs \$683,805 of expenditures that Toolco necessarily incurred to stay a judgment in the amount of \$145,448,141.07 in favor of plaintiff-appellant Trans World Airlines, Inc. ("TWA") that was reversed by the Supreme Court, and (b) allowed, as a setoff against the costs that the District Court did allow, \$4,605.65 in expenses incurred by TWA in preparation for a deposition that did not take place.

* In December, 1972, Hughes Tool Company changed its name to "Summa Corporation". For convenience, however, it is referred to herein by its prior name.

The costs that the District Court disallowed were part of the price paid by Toolco for obtaining a stay of execution pending appeal. The obtaining of a supersedeas bond in the full amount of the judgment was not practicable because of the unprecedented size of the judgment. For this reason, the District Court granted a stay of execution of the judgment, pending appeal, on the condition that Toolco arrange to post security in the amount of \$75 million by a letter of credit in favor of TWA and, in effect, secure the balance of \$86,447,686.09 by maintaining its net worth at three times the amount of the balance. To evidence this net worth, the District Court required Toolco to furnish to TWA quarterly statements audited by its independent public accountants.

The District Court allowed as costs the fee paid to Bank of America, N.T.S.A. ("Bank of America") in connection with the letter of credit. But it disallowed costs incurred in the amount of \$66,040.40 in obtaining a Deed of Trust on real property in California that the Bank of America required as a condition precedent to issuing the letter of credit. And it disallowed costs in the amount of \$617,765 that Toolco incurred in order to furnish the quarterly audits that were required in connection with securing the balance of the judgment.

In disallowing the costs of the quarterly audits the District Court stated that Toolco should bear the cost of allowing business to go on as usual. It gave no explanation for its disallowing the \$66,040.40.

Issues Presented

This appeal presents the following issues for review:

(1) Whether it was error and an abuse of discretion for the District Court to disallow as costs of an appeal a portion

of the expenses necessarily incurred in staying execution pending appeal, where, because of the size of the judgment, a supersedeas bond could not be obtained and other provisions were made to secure the judgment;

(2) Whether it was error and an abuse of discretion for the District Court to award to a plaintiff, after its complaint had been dismissed pursuant to the mandate of the Supreme Court, as a setoff against the costs of the defendants, expenses incurred in preparation for a deposition scheduled some eleven years previously that had not taken place?

Statement of the Case

On April 14, 1970, the District Court entered judgment in favor of TWA in the amount of \$145,448,141.07 of which \$137,611,435.95 represented treble damages under the anti-trust laws and the remainder costs and attorneys' fees. The damage award, according to the District Court, was thirty times greater than any previous award. (App. 20a).

No bonding company would write a supersedeas bond to secure the judgment unless the amount of the bond in turn was secured by cash or cash equivalents. (App. 12a-14a). Under General Rule 33 of the District Court the bond would have had to be in the amount of \$161,447,686.59. (App. 7a-8a).

To permit Toolco to exercise its constitutional right to appeal without being forced to liquidate a third of its business, Toolco applied to the District Court to stay the judgment, either without requiring the posting of security or by securing the judgment (a) with a lien upon property of Toolco having a value in excess of the compensatory portion of the judgment and (b) with a provision that the stay would continue only so long as Toolco maintained a

net worth in excess of three times the amount of the judgment. TWA opposed the application, taking the position that a stay should not be granted unless security in the full amount be posted of a type permitted by General Rule 31.

The District Court held three hearings in an attempt to resolve the conflicting positions of the parties. At a hearing on May 11, 1970, it recognized that Toolco could not be called upon "under these unusual circumstances" to put up a bond in the amount upon which TWA was insisting. (App. 23a). While maintaining the position that Toolco should arrange for financing to secure the judgment in full (App. 77a), counsel for TWA asserted that if consideration was to be given to Toolco's proposal, TWA should receive the same treatment as would be afforded a lending institution, including the furnishing to it of certified, detailed financial statements and regular certificates of responsible officers of Toolco as to the maintenance of net worth. (App. 27a-28a). To meet this objection, Toolco offered to engage Haskins & Sells to prepare quarterly audits. (App. 43a).

After further hearings on May 20 and June 3, 1970, the District Court on June 10, 1970, handed down a decision and order that adopted a position half way between the views of Toolco and those of TWA. The Court concluded (App. 80a-81a):

"Part of business as usual must include some recognition of the rights of this plaintiff that has acquired a judgment against Toolco for violation of the anti-trust laws of the United States. Toolco requests plaintiff to forgo both immediate collection of its judgment and full security for that judgment pending appeal. It must be prepared to assume some financial burden to

achieve 'business as usual.' At the same time, I fully appreciate that under present conditions a supersedeas bond in the amount contemplated by Rule 33 is not practicable under the circumstances. I have come to the conclusion that Toolco can arrange to post security in the form required by Rule 31(b) in the amount of \$75,000,000. This shall be done on or before June 22, 1970. The balance of \$86,447,686.59 shall be secured along the lines suggested by the defendants as to the maintenance of Toolco's net worth at three times the amount of such balance. The details of this arrangement shall be worked out between counsel. Each knows what the other has proposed. The court cannot be expected, on the papers before it, to come up with a satisfactory resolution embodying such detailed and intricate financial considerations. It should not be required to devote the time necessary to preside over such a conference between counsel. Obviously, there has to be flexibility on both sides for this endeavor to be successful."

Counsel for Toolco and counsel for TWA worked out the details of an arrangement consistent with the court's decision. An order was presented to the District Court, to which counsel for TWA and counsel for Toolco consented. This order (App. 86a-91a) provided for a stay pending appeal on the conditions that Toolco file a supersedeas bond in an amount not less than \$75 million and maintain a net worth in excess of \$335 million. The order, entered on June 16, 1970, required Toolco to furnish to TWA an audited balance sheet on a quarterly basis together with a certification by Haskins & Sells to show that Toolco's net worth was in fact in excess of \$335 million. (App. 86a-91a).

Thereafter, on June 25, 1970, the District Court entered an order permitting Toolco to substitute a letter of credit

from the Bank of America in favor of TWA in the amount of \$75 million for the security required to be provided in its prior order. (App. 104a-105a).

The Bank of America issued the letter of credit. A condition precedent to the issuance was that Toolco secure the letter of credit. (App. 174a-175a). Part of that security took the form of the proceeds of a real estate loan against a recorded Deed of Trust. Toolco paid the Bank of America a fee of \$12,500 in connection with this loan, paid \$53,488.80 for title insurance and \$51.60 for recordation, or a total of \$66,040.40. (App. 174a-175a). The costs of the quarterly audits amounted to \$617,765.*

Following the reversal of the judgment and the dismissal of the complaint pursuant to the mandate of the Supreme Court, Toolco applied to the Clerk of the District Court for the taxation of costs. The Clerk allowed all the costs of effecting the stay, including the costs of the quarterly audits and the fees and expenses connected with securing the letter of credit. (App. 113a-115a). The District Court allowed only part of the costs of effecting the stay. It held that the interest paid to the Bank of America on the letter of credit was a proper cost. But it disallowed the expenses incurred to secure the letter of credit without explanation other than: "Such costs must be borne by the defendant." (App. 201a). And it disallowed the costs of the quarterly audits on the ground that "[t]hese audits were accepted by the court at the request of the defendant as a less drastic

* After this Court affirmed the judgment for TWA, it granted a stay pending an application for a writ of certiorari but only on the condition that Toolco file, in addition to the security ordered by the District Court, a supersedeas bond in the amount of \$85,000,000. The Supreme Court, on application of Toolco, then granted a stay on the same security that had been approved by the District Court. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 404 U.S. 242 (1971).

but more costly form of protection of the judgment" and that defendant "should bear the cost of allowing business to go on as usual." (App. 201a-202a). It gave no explanation for its allowance as a setoff for costs of \$4,602.65 in connection with the deposition of Howard R. Hughes, other than that TWA was entitled to the setoff.

ARGUMENT

POINT I

The District Court Acted Arbitrarily in Disallowing a Portion of the Costs Toolco Incurred in Order to Stay the Judgment.

Rule 39(e) of the Rules of Appellate Procedure provides that "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

The District Court recognized that Toolco was entitled to recover as costs the expenses it incurred in order to preserve its rights pending appeal as provided in the stay orders. But it limited those costs to interest paid to the Bank of America for the letter of credit in the amount of \$75 million, which it termed in the nature of a commitment fee. Without any rational basis, it disallowed expenses that Toolco necessarily incurred in connection with securing the remaining \$86,447,685.69. And it disallowed the costs of securing the letter of credit even though they were as necessary to obtaining and maintaining the letter of credit as the interest paid to the Bank of America. All these costs were necessarily incurred in effecting the stay and it was an abuse of discretion for the District Court to pick and choose among them to allow as taxable costs one item

of expense in effecting the stay and to disallow the remainder, either for no good reason or for no reason at all.

As Justice Frankfurter stated in *Brown v. Allen*, 344 U.S. 443, 496 (1953), "[d]iscernment without a criterion for its exercise is authorization of arbitrariness." No criterion that guided the District Court in the disallowance of these items of cost or in imposing a setoff in favor of TWA is discernible.

A. As to the Cost of the Quarterly Audits

Toolco incurred a \$617,765 expense in order to furnish TWA quarterly with a certified balance sheet as required by the order of the District Court. The District Court disallowed this expense as a taxable cost, saying that these audits were accepted by the court at the request of the defendant as a less drastic but more costly form of protection of the judgment and that defendant should bear the cost of allowing business to go on as usual. The explanation of the disallowance shows that the disallowance was arbitrary.

In the first place, the audits were not at the request of the defendant but rather in response to a request of the plaintiff. (App. 27a-28a). If TWA did not desire the quarterly audits, it had only to say so. They were a necessary part of the security furnished to TWA by the undertaking that Toolco's net worth would be maintained at not less than \$335 million.

More importantly, the statement that the defendant should bear the cost of allowing business to go on as usual is not only unsupported by any authority but contrary to the whole purpose of allowing as taxable costs the premium on supersedeas bonds or, in appropriate cases, other costs incurred in obtaining a stay of the judgment. See, e.g.,

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 316 F.2d 275 (9th Cir. 1962).

The costs of a supersedeas bond have long been held to be a proper item of cost. *Berner v. British Commonwealth Pacific Airlines Limited*, 362 F.2d 799 (1966). And the reason is that "premiums reasonably required . . . to relieve property from . . . execution cannot be regarded as 'optional rather than necessary.'" *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir. 1937). If a defendant has to liquidate either all or a material part of his business in order to exercise the right to appeal, then that right becomes of doubtful value.

Of course, Toolco wanted to conduct business as usual. The purpose of a stay is to permit business as usual. So long as TWA was adequately secured, Toolco was entitled to conduct business as usual. The cost of any supersedeas bond is always a cost incurred to permit business as usual.

The District Court recognized that the ordinary supersedeas bond could not be obtained to secure the monstrous judgment that TWA had obtained. (App. 80a-81a). The letter of credit secured \$75 million of the judgment. Toolco's net worth of at least \$335 million secured the remainder. The quarterly audits were an integral part of providing adequate security to TWA. The whole purpose of the order was to provide adequate security to TWA while permitting Toolco to operate its business without having to liquidate a third or more of it.

Are the costs of obtaining a stay to be non-taxable any time the defendant wants to conduct business as usual? If not, then the District Court was being arbitrary in disallowing the costs of the quarterly audits.

The District Court said it accepted the quarterly audits as "a less drastic but more costly form of protection of

the judgment." Less drastic than what? Than paying the judgment or putting up cash or cash equivalents to secure it, a form of protection that would have come to the same thing as paying the judgment? That would have been drastic indeed. Obtaining a stay of execution is to the defendant generally less drastic than paying a judgment. Particularly one for over \$145 million. And more costly to whom? Certainly not to the defendant. And not to TWA either.

The fact is that \$617,765 is a small price to pay for protecting over \$86.6 million of a judgment for $2\frac{3}{4}$ years. It comes to less than $\frac{1}{3}$ of 1% a year, a less costly form of protection than the letter of credit.

The District Court recognized that the annual fee of $\frac{1}{2}$ of 1% on the letter of credit was a properly taxable cost. If Toolco had made the same arrangement for the entire judgment, assuming that it could have done so, the cost would have come to \$2,186,270 during the life of the stay, an amount that under the District Court's decision would have been taxable as costs. Of this amount \$1,170,645.75 would have been applicable to the portion of the judgment that under the Court's order was in fact secured by Toolco's net worth. The cost of the quarterly audits was only \$617,765. The "more costly form of protection" that the Court order provided *saved* TWA \$552,889.75. To disallow the cost of an arrangement that permitted a stay at a saving of over \$500,000 has no logical basis in fact or law.

B. As to the Cost of Securing the Letter of Credit

Much that has been said as to the disallowance of the costs of the quarterly audits is applicable to the costs of obtaining the letter of credit. These amounts were incurred to satisfy a condition precedent on which the Bank

of America had insisted. (App. 175a). Without them there would have been no stay of the judgment.

The District Court gave no explanation for its disallowance of these expenses as taxable costs other than the bare, bald statement: "Such costs must be borne by the defendant." (App. 201a). If by "must" the District Court meant that as a matter of law these expenses could not be taxed as costs, then it was in error. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, supra*. If it meant something else, then there is no logic to its allowing the major part of the charges that the Bank of America made in connection with the letter of credit but disallowing \$66,040.40 that had to be paid to the Bank, in part as a fee, in part to pay expenses, in order to fulfill a condition precedent to the issuance of the letter of credit.

POINT II

The Setoff of \$4,602.65 Ordered by the District Court Was Clearly Arbitrary.

TWA's entitlement to a setoff for costs of \$4,602.65 "regarding the Hughes deposition" is again something for which the District Court gave no explanation. (App. 202a). Certainly there was no warrant for taxing any costs against Toolco in light of the Supreme Court's disposition of the case.

Is this some additional sanction for Toolco's election not to go forward with discovery and instead to rest on the merits of its legal positions? It is a little late for sanctions after a complaint has been dismissed. And if the decision of the Supreme Court (409 U.S. 363) establishes anything, it is that there was no need or occasion for the Hughes deposition in light of Toolco's affirmative defense.

In comparison with most amounts involved in this action, \$4,602.65 may pale into insignificance. But that is no reason for the arbitrary imposition of a penalty to be set off against the taxable costs that Toolco was entitled to recover.

CONCLUSION

For the reasons stated, this appeal should be granted in all respects and the case remanded to the District Court with instructions to allow \$683,805 in additional costs to Toolco.

Respectfully submitted,

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Dated: May 28, 1974.

UNITED STATES COURT OF APPEALS

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Plaintiff-Appellee, :

-against-

: Docket No. 74-1243

HOWARD R. HUGHES, HUGHES TOOL COMPANY :
and RAYMOND M. HOLLIDAY, :

Defendants-Appellants. :
-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BARRY LIND, being duly sworn, deposes and says:

That deponent is not a party to the sction, is over
18 years of age and resides at 928 Mace Avenue, Bronx, New York.

That on the 28th day of May, 1974, deponent served
the within BRIEF FOR DEFENDANTS-APPELLANTS HUGHES TOOL COMPANY
AND RAYMOND M. HOLLIDAY upon Cahill Gordon & Reindel, at 80 Pine
Street, New York, New York by delivering true copies thereof to
them personally. Deponent knew the persons so served to be the
persons mentioned in said papers as Attorneys for Plaintiff-
Appellee.

Barry Lind
Barry Lind

Sworn to before me this
28th day of May, 1974.

Grace H. Yoshizaki
Notary Public

GRACE H. YOSHIKAKI
Notary Public, State of New York
No. 43,436,520